Supreme Court, U.S.
FILED
JAN 10 2003
OFFICE OF THE CLERK

No. 02-361

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,

Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

On Appeal From The United States District Court For The Eastern District Of Pennsylvania

BRIEF AMICI CURIAE OF SENATOR TRENT LOTT, CONGRESSMAN CHARLES W. "CHIP" PICKERING, CONGRESSMAN MARK SOUDER, AND CONGRESSMAN ROGER F. WICKER IN SUPPORT OF APPELLANTS

BRIAN FAHLING
Senior Trial Attorney
(*Counsel of Record*)
STEPHEN M. CRAMPTON
Chief Counsel
MICHAEL J. DEPRIMO
Senior Litigation Counsel
AFA CENTER FOR LAW & POLICY
100 Parkgate Dr.
Ste. 2-B
P.O. Drawer 2440
Tupelo, MS 38803
Tel: 662.680.3886
Fax: 662.844.4234

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

19pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. THE PROBLEM CONGRESS SOUGHT TO ADDRESS WITH CIPA	5
A. Sexually Explicit Images in Public Libraries	5
B. Alternative Measures to Filtering Have Been Tried and Have Failed	7
II. CIPA IS A CONSTITUTIONAL TIME, PLACE AND MANNER REGULATION INTENDED TO PROTECT LIBRARY PATRONS, STAFF, AND CHILDREN FROM THE ADVERSE SECONDARY EFFECTS OF SEXUALLY EXPLICIT MATERIAL DISPLAYED ON MONITORS IN PUBLIC LIBRARIES	9
A CIPA Is Not a Content Based Regulation	9
B. Delay Is Not Denial, and There Is No Constitutional Right to Be Free From Embarrassment When Checking Out a Book or Requesting Assistance From a Librarian to Unblock a Website	11
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES:

American Library Ass'n v. United States, 201 F. Supp.2d 401 (E.D. Pa. 2002) ..... *passim*

Brown v. Louisiana, 383 U.S. 131 (1966) 9

Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996) 12

Fabulous Assocs., Inc. v. Pa. Pub. Util. Comm'n, 896 F.2d 780 (3d Cir. 1990) 12

Ginsberg v. New York, 390 U.S. 629 (1968) 10

Grayned v. City of Rockford, 408 U.S. 104 (1972) 4

Lamont v. Postmaster General, 381 U.S. 301 (1965) 11

Miller v. California, 413 U.S. 15 (1973) 10

New York v. Ferber, 458 U.S. 747(1982) 9

Reno v. ACLU, 521 U.S. 844 (1997) 9

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1985) 10

Roth v. United States, 354 U.S. 476 (1957) 10

Sable Communications v. FCC, 492 U.S. 115 (1989) 10

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 10, 11, 14

OTHER AUTHORITIES:

U.S. Const. amend. I ..... *passim*

Children's Internet Protection Act (CIPA), Pub. L. No. 106-554 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Library Services and Technology Act (LSTA), 20 U.S.C. § 9121 2

Telecommunications Act, 47 U.S.C. § 254 2

INTEREST OF AMICI[1]

Amici Curiae are Senator Trent Lott, who represents the State of Mississippi in the United States Senate; Congressman Charles W. "Chip" Pickering, who represents the Third District of Mississippi in the United States House of Representatives; Congressman Mark Souder, who represents the Fourth District of Indiana in the United States House of Representatives; and Congressman Roger F. Wicker, who represents the First District of Mississippi in the United States House of Representatives. All were proponents and/or co-sponsors of the Childrens Internet Protection Act.

As citizens and Members of Congress, Mr. Lott, Mr. Pickering, Mr. Souder, and Mr. Wicker have an abiding interest in ensuring appropriate protection for children, adults, and staff in our public libraries. These members of Congress thus have a strong interest in this case and submit that the Children's Internet Protection Act is a constitutional means to attain that worthy object.

SUMMARY OF ARGUMENT

This case marks with stunning clarity the previously undefined intersection between government regulated Internet access in public libraries and First Amendment jurisprudence. A collision was inevitable, and when it finally occurred in the court below, undifferentiated

[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amici Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Internet access appears to have been the only survivor. The wooden application of traditional First Amendment law to the extraordinary dynamics and problems presented by patrons who access sexually explicit material via the Internet in public libraries strips government of the ability to protect children and others from the adverse secondary effects of such material. Congress sought to require such protection when it adopted the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554,[2] whose principal object was to prevent the adverse secondary effects that arise from the introduction of material that is obscene, child pornography, or harmful to minors into federally funded public libraries.

It has long been recognized that government may constitutionally protect the public by regulating obscenity, material harmful to minors, and sexually oriented businesses. After the ruling of the court below, however, Congress cannot provide the same protection to its citizens, especially children, in public libraries. First Amendment jurisprudence must be adapted to the realities of technology in the twenty-first century if libraries are to remain places "dedicated to quiet, to knowledge, and to beauty," and if Congress is to be permitted to provide library patrons and staff protection from the adverse secondary effects arising from exposure to sexually explicit material. The ruling of the court below should be reversed.

---

[2] CIPA makes the use of filters by a public library a condition of its receipt of two kinds of subsidies, grants under the Library Services and Technology Act, 20 U.S.C. § 9121 *et seq.* (LSTA), and so-called "E-rate discounts" for Internet access and support under the Telecommunications Act, 47 U.S.C. § 254.

ARGUMENT

This case highlights the difficulties that attend First Amendment questions presented in the context of spectacular, and until recently, unimaginable technological advances that have revolutionized our society. The Internet has become ubiquitous, and with its manifold benefits come significant questions about the right of government to protect its citizens in public places where the Internet is made available. Specifically, the introduction of the Internet has brought with it the introduction into public libraries of material that is obscene, child pornography, and harmful to minors.[3] Library staff and patrons, including children, are now regularly confronted by sexually explicit images, the exhibiting of which in any other public setting is subject to outright prohibition under obscenity statutes, and strict regulation under harmful to minor statutes, public nudity ordinances, and zoning restrictions such as those placed upon sexually oriented businesses. CIPA was designed to ensure that public libraries receiving federal funding provide similar protection to their patrons and staff. See H. Con. Res. 441 (2002) (expressing the sense of

---

[3] When an individual logs onto the Internet, he has at his fingertips the largest data base in the world. In addition to literally billions of pages covering every imaginable subject, the Internet also contains millions of pages of material that is obscene, child pornography, and/or harmful to minors. *American Library Ass'n v. United States*, 201 F. Supp.2d 401, 406 (E.D. Pa. 2002) (noting there are more than 100,000 pornographic Web sites that can be accessed for free without providing any registration information). In public libraries, adults, adolescents, and children regularly seek Internet access to hard-core pornography. *Id.* at 405-406, 423. And library staff and patrons are regularly exposed to obscene images left on computer terminal screens. *Id.* at 423.

Congress that CIPA "simply regulates the time, place and manner of speech in a reasonable way").

The unique nature of the Internet and the problems posed by it to public libraries have no real analogue in First Amendment jurisprudence. Prior to the ruling by the court below, decisions about what materials are made available to library patrons rested in the editorial discretion of public libraries. There is no principle of law that can be pressed into service to require, for example, that a library carry Penthouse or other sexually explicit material. There is no constitutional right to require public libraries, paid for by public funds, to provide unrestricted access to sexually explicit material.[4]

The unique characteristics of the Internet, however, as amplified by the lower court's reasoning, remove decision-making authority from libraries and place it directly in the hands of library patrons. *American Library Ass'n*, 201 F. Supp.2d at 464. The fundamental question presented, then, is whether public libraries, merely by providing Internet access, are constitutionally *required* to relinquish all editorial discretion over what is permitted in the library, even when it involves material that is obscene, child pornography, and/or material harmful to minors, simply because current technology does not permit them to exclude such material with mathematical precision. *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)

[4] The constitutional right to receive indecent materials does not correspond to a right of government provision. There is simply no legal basis to assume that government libraries are required to provide pornography to their patrons. Thus, the fundamental presupposition upon which the lower court rested its decision is invalid.

("Condemned to the use of words, we can never expect mathematical certainty from our language.").

I. THE PROBLEM CONGRESS SOUGHT TO ADDRESS WITH CIPA

With CIPA, Congress sought to deal with the widespread problem of sexually explicit images being displayed on computer terminals in public libraries that provide Internet access. Congress determined that preventing access to the images was the most effective way to accomplish the goal of avoiding the adverse secondary effects associated with the viewing of such images by children, non-consenting adults, and library staff. "Less restrictive" alternative measures identified by the court below become operative only after the sexually explicit image appears on the computer screen, the very evil CIPA was designed to avoid.

A. Sexually Explicit Images in Public Libraries.

Sexually explicit material on the Internet is easily accessed using any public search engine, such as Google or AltaVista. *American Library Ass'n*, 201 F. Supp.2d at 419. And although much of the sexually explicit material available on the Web is posted on commercial sites that require viewers to pay in order to gain access to the site, a large number of sexually explicit sites may be accessed for free and without providing any registration information. *Id.* Some Web sites that contain sexually explicit content

seek to lure the unwitting user with innocuous domain names that can be reached accidentally.[5]

Inadvertent access to sexually explicit sites by patrons is just one problem that libraries face. Libraries are also confronted, for example, with situations in which patrons leave sexually explicit images on an Internet terminal so that the next patron will see them when they begin using it, or in which patrons print sexually explicit images from a Web site and leave them at a public printer. *Id.* at 423. A study of the Tacoma Public Library's Internet use logs for the year 2000 (a study credited by the court below) showed that users between the ages of 11 and 15 accounted for 41% of the filter blocks that occurred on library computers. The study concluded that children and young teens were actively seeking to access sexually explicit images in the library. *Id.*

The problem of library patrons surfing the Web for pornography was captured in the testimony of the Chairman of the Board of the Greenville, South Carolina Public Library.[6] In December 1999, there was considerable local

[5] One commonly cited example is http://www.whitehouse.com. Other innocent-sounding URLs that retrieve graphic, sexually explicit depictions include http://www.boys.com, http://www.girls.com, http://www.coffeebeansupply.com, and http://www.BookstoreUSA.com. Moreover, commercial Web sites that contain sexually explicit material often use a technique of attaching pop-up windows to their sites, which open new windows advertising other sexually explicit sites without any prompting by the user. This technique makes it difficult for a user to quickly exit all of the pages containing sexually explicit material, whether he or she initially accessed such material intentionally or not. *Id.* at 419.

[6] The Chairman's testimony is illustrative of other librarians and board members who testified in the trial court below. *Id.* at 423.

press coverage in Greenville concerning adult patrons who routinely used the library to surf the Web for pornography. *Id.* In response to public outcry stemming from the newspaper report, the Trustees held a special board meeting. *Id.* At the meeting, the Trustees learned for the first time of complaints that children were being exposed to pornography that was displayed on the library's Internet terminals. *Id.*

B. Alternative Measures to Filtering Have Been Tried and Have Failed.

The court below identified three "less restrictive" alternatives to filtering to deal with the problem of Internet pornography in libraries. *Id.* at 424. The three alternative measures were (1) channeling patrons' Internet use; (2) separating patrons so that they will not see what other patrons are viewing (this method includes the installation of privacy screens and recessed monitors); and (3) placing Internet terminals in public view and having librarians observe patrons to make sure that they are complying with the library's Internet use policy. *Id.* Significantly, all of the alternative methods suffer significant drawbacks, not the least of which is their failure to prevent patrons from accessing sexually explicit images and the corresponding failure to prevent inadvertent viewing of the images. *Id.* at 424-426. In short, the "alternative" methods are really not alternatives at all because they permit precisely what CIPA seeks to prevent – the display of sexually explicit material on library monitors.

The experience of the Greenville library is illustrative of the failure of the alternative measures to protect against the problem of Internet pornography in libraries. Early in 2000, the Greenville library installed privacy

screens and recessed terminals in an effort to restrict the display of sexually explicit Web sites at the library. Staff were also told that they were to enforce the library's policy prohibiting access to obscenity, child pornography, etc., by means of a "tap on the shoulder." *Id.* at 423-424. The library later removed the privacy screens and reconfigured the location of the computers so that librarians had visual contact with all Internet-accessible terminals, and removed the privacy screens from terminals with Internet access. *Id.* Even after the Board implemented the privacy screens and later the "tap-on-the-shoulder" policy combined with placing terminals in view of librarians, the library experienced a high turnover rate among reference librarians who worked in view of Internet terminals. *Id.* The Board found that the policies it had tried failed to prevent the viewing of sexually explicit materials in the library. *Id.* The Board finally concluded that the methods it had used to regulate Internet use were not sufficient to stem the problems linked to the availability of pornographic materials in the library. *Id.*

Each of the alternative measures identified by the court below fails to accomplish the object intended by CIPA. Unlike filters, which are designed to prevent prohibited content from being imported into the library in order to prevent adverse secondary effects such as the impact on children who are exposed to sexually explicit images, the alternative measures, as a practical matter, become operative only *after* such material is present on the computer monitor, and so can be inadvertently viewed by children, non-consenting adults, and library staff, thereby causing the very harmful secondary effects CIPA was intended to prevent.

II. CIPA IS A CONSTITUTIONAL TIME, PLACE AND MANNER REGULATION INTENDED TO PROTECT LIBRARY PATRONS, STAFF, AND CHILDREN FROM THE ADVERSE SECONDARY EFFECTS OF SEXUALLY EXPLICIT MATERIAL DISPLAYED ON MONITORS IN PUBLIC LIBRARIES.

This Court has observed that a library is "a place dedicated to quiet, to knowledge, and to beauty." *Brown v. Louisiana*, 383 U.S. 131, 142 (1966). CIPA was an unmistakable Congressional effort to preserve and perpetuate this idea in the face of clear evidence that access to the Internet is rapidly transforming public libraries into publicly funded adult bookstores where children, as well as unwitting adults, are exposed to sexually explicit material. The ruling of the court below will, unfortunately, ensure that the noble quiddity of the library will become little more than a faint memory. The court below should therefore be reversed.

A. CIPA Is Not a Content Based Regulation.

CIPA, by its very name, underscores the fact that Congress sought, not to regulate content, but to protect against the adverse secondary effects of children being exposed to sexually explicit material in public libraries, among others. In order to accomplish this goal, CIPA requires that libraries block or filter visual depictions that are obscene, child pornography, or harmful to minors. CIPA, § 1721(b). Transmission of obscenity and child pornography, whether via the Internet or other means, is illegal under federal law both for juveniles and adults and thus has no protection under the First Amendment. *Reno v. ACLU*, 521 U.S. 844, 877 n.44 (1997); *New York v.*

Ferber, 458 U.S. 747, 764 (1982); *Miller v. California*, 413 U.S. 15, 20 (1973); *Roth v. United States*, 354 U.S. 476, 484-485 (1957).

This Court has likewise recognized that states have a compelling interest in protecting the physical and psychological well-being of minors from the harmful effects of sexually explicit material. *See, e.g., Sable Communications v. FCC*, 492 U.S. 115 (1989). In *Ginsberg v. New York*, 390 U.S. 629 (1968), this Court upheld a conviction for selling to a minor magazines which were concededly not "obscene" if shown to adults. Furthermore, it was pointed out in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion), that even members of the Court who accorded the greatest protection to such materials repeatedly indicated that the State could prohibit their distribution or exhibition to juveniles and unconsenting adults. *Id.* at 69. CIPA is intended to prohibit such materials.

There is a dramatic, if not perfect correspondence between the issues raised in this case and those extant in traditional "secondary effects" cases. In *American Mini Theatres*, for instance, a city determined that a concentration of "adult" movie theaters caused an area of the city to deteriorate and become a focus of crime, effects which were not attributable to theaters showing other types of films. This Court upheld the ordinances regulating adult theaters because it was the secondary effects which the zoning ordinances attemped to avoid, not the dissemination of "offensive" speech. *Id.* at 71; *see also Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1985).

Similarly, CIPA is based on Congress' determination that sexually explicit images on a computer terminal in a public library cause adverse secondary effects which are not attributable to other images that might appear on a

computer monitor in a library. It is the adverse secondary effects of the sexually explicit images that CIPA seeks to prohibit, not the dissemination of "offensive" speech. Indeed, CIPA's filter requirement is unaffected by whatever social, political, or philosophical message an image may be intended to communicate; whether an image ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same. *Cf. American Mini Theatres,* 427 U.S. at 70. Just as the city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect," *id.* at 71, so Congress' interest in protecting library patrons and in preserving the quality of federally funded libraries must be afforded similar respect.

It is also important that the wisdom of Congress' chosen means to deal with the problem not be questioned. In *American Mini Theatres*, this Court observed, "[i]t is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [The] city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* (brackets in original). Congress must also be given a reasonable opportunity to deal with the admittedly serious problem caused by sexually explicit images on the Internet.

B. Delay Is Not Denial, and There Is No Constitutional Right to Be Free From Embarrassment When Checking Out a Book or Requesting Assistance From a Librarian to Unblock a Website.

The lower court went so far as to find constitutionally impermissible CIPA's provisions permitting a patron to request that a site be unblocked. Citing *Lamont v.*

Postmaster General, 381 U.S. 301 (1965) (federal statute which required Postmaster General to halt delivery of communist propaganda unless the addressee affirmatively requested the material held unconstitutional), *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (federal law requiring cable operators to allow access to patently offensive, sexually explicit programming only to those subscribers who requested access in advance and in writing held unconstitutional), and *Fabulous Assocs., Inc. v. Pa. Pub. Util. Comm'n*, 896 F.2d 780 (3d Cir. 1990) (state law requiring telephone users who wish to listen to sexually explicit telephone messages to apply for an access code to receive such messages held unconstitutional), the court below found that "even if [CIPA's] disabling provisions permit public libraries to allow patrons to access speech that is constitutionally protected yet erroneously blocked . . . the requirement that library patrons ask a state actor's permission to access disfavored content violates the First Amendment." *American Library Ass'n*, 201 F. Supp.2d at 486. The cases relied upon by the court below are clearly inapposite, as they have nothing to do with conduct in a public setting that causes adverse secondary effects on others with an equal right to be there; rather, they deal with an individual's right to receive mail, to view pornography in his home, and to listen to sexually explicit messages over the telephone.

Nevertheless, reasoning from those cases, the lower court found CIPA's disabling provisions constitutionally flawed for two reasons. First, the court thought the provisions would deter patrons from asking permission to access constitutionally protected but sensitive information. *Id.* For example, the lower court believed that a patron who was too embarrassed to request assistance from a librarian would suffer constitutional injury as a result. *Id.*

at 487. And second, the lower court found that even where requests could be made anonymously, delay in acting on the request would likewise inflict constitutional injury on the patron. *Id.* at 487-488.

In the absence of any affinity between the cases cited by the lower court and the instant case, it is unclear why the lower court relied on them in reaching its conclusions that delay in access to an Internet site, and deterrence arising from embarrassment in requesting assistance amount to constitutional violations. The most obvious and apropos analogues suggest a different conclusion. Inter-library loans, for example, have never been found to be unconstitutional (as it apparently never occurred to anyone that inter-library loans are unconstitutional), though the patron who is denied access to a desired book because of its unavailability at his library must patiently await its arrival from another library. And if the desired book is of a "sensitive" nature so as to cause embarrassment to the patron who must now request it via an inter-library loan, she must overcome her embarrassment or forgo the desired tome – but she will have suffered no constitutional injury.

The inconveniences of inter-library loans and delayed access to a blocked Internet site, then, are identical in quality (although access to a blocked Internet site may be delayed considerably less than an inter-library loan), only the means of acquisition differs. In each case, delay and potential embarrassment confront the library patron. *The Joy of Sex* in the form of a book carries with it no constitutional right to be free from embarrassment nor a constitutional right to immediate acquisition by adult library patrons; however, if *The Joy of Sex* is available on the Internet but is inadvertently blocked by a public library's

filtering software, there immediately arises, under the lower court's reasoning, a constitutional right for adult library patrons not to be delayed in acquiring it or embarrassed in having to request assistance in acquiring it. Such distinctions defy logic.

As this Court has observed,

> though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. . . . Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'specified Sexual Activities' exhibited in the theaters of our choice.

American Mini Theatres, Inc., 427 U.S. at 70. CIPA is a constitutional time, place and manner regulation intended to address the serious problem occasioned by sexually explicit materials on the Internet in public libraries.

CONCLUSION

Whatever may be the right of a public library patron to receive and view sexually explicit materials, it should not be permitted to trump the right of Congress to impose reasonable restrictions on the use of the Internet in order to protect innocent children and others from the potentially devastating secondary effects of accidentally confronting hardcore pornographic images on a computer screen. CIPA is a valid time, place and manner regulation targeting harmful secondary effects. The lower court should be reversed.

Respectfully submitted,

BRIAN FAHLING
Senior Trial Attorney
(*Counsel of Record*)
STEPHEN M. CRAMPTON
Chief Counsel
MICHAEL J. DEPRIMO
Senior Litigation Counsel
AFA CENTER FOR LAW & POLICY
100 Parkgate Dr.
Ste. 2-B
P.O. Drawer 2440
Tupelo, MS 38803
Tel: 662.680.3886
Fax: 662.844.4234